SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mathews* [2010] QCA 196
PARTIES:	**R** **v** **MATHEWS, Russell Gordon Haig** (applicant/appellant)
FILE NO/S:	CA No 56 of 2010 DC No 33690 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore on 20 July 2010 Reasons delivered on 30 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2010
JUDGES:	McMurdo P, Fraser JA and White JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 20 July 2010** **1. Application for leave to appeal granted.** **2. Appeal allowed.** **3. The order of the District Court of 19 March 2010 is set aside and instead the following orders are substituted:** **(a) the applicant is granted an extension of time to appeal to 19 March 2010;** **(b) the appeal is allowed;** **(c) the orders of the Magistrates Court of 1 June 2005 and 17 December 2008 are set aside;** **(d) instead, the charge of public nuisance brought against the applicant is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF TRIAL JUDGE – appellant applied for leave from order of District Court Judge refusing application to extend time to appeal from orders of Magistrate – Magistrate sentenced applicant for public nuisance before determining whether on evidence applicant was guilty or not guilty – Magistrate purported to re-open sentence and set aside conviction under s 188(3)(a) *Penalties and Sentences Act* 1992 (Qld) three

years later – whether Magistrate sentencing the appellant before determining guilt was unlawful – whether Magistrate's purported setting aside conviction and sentence was unlawful – whether District Court should have set aside orders of Magistrates Court

Penalties and Sentences Act (1992) Qld, s 19, s 188(3)(a)
Vagrants, Gaming and Other Offences Act 1931 (Qld) (repealed), s 7AA, s 39

COUNSEL: The appellant appeared on his own behalf
M B Lehane for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** On 20 July 2010, this Court made the following orders:

1. Application for leave to appeal granted.

2. Appeal allowed.

3. The order of the District Court of 19 March 2010 is set aside and instead the following orders are substituted:

(a) the applicant is granted an extension of time to appeal to 19 March 2010;

(b) the appeal is allowed;

(c) the orders of the Magistrates Court of 1 June 2005 and 17 December 2008 are set aside;

(d) instead, the charge of public nuisance brought against the applicant is dismissed.

[2] These are my reasons for joining in those orders. The applicant, Russell Gordon Haig Mathews, applied for leave to appeal to this Court under s 118(3) *District Court of Queensland Act* 1967 (Qld) from a District Court judge's order refusing his application to extend time to appeal from orders made in the Magistrates Court. Mr Mathews was originally charged with committing a public nuisance on 29 November 2004 under s 7AA *Vagrants, Gaming and Other Offences Act* 1931 (Qld) (repealed). The matter came on for hearing in the Brisbane Magistrates Court on 1 June 2005.

[3] The magistrate did not ask Mr Mathews to enter a plea, but instead told the police prosecutor to outline the case alleged against Mr Mathews before dealing with some preliminary matters concerning summoned witnesses who were legally represented.

[4] According to the transcript, the hearing proceeded as follows:

"[POLICE PROSECUTOR]: ... the Council have issued a notice to [Mr Mathews] to clean up his yard. He hasn't complied with that.

… The Council have gone there, and they've approached [Mr Mathews], and he hasn't complied, and they've actually got some trucks, and it's taken them a couple of days, I think, three days, in fact, to clean up the yard.

…

And during the first day, [Mr Mathews] has actually caused a public nuisance.

BENCH: What's he done?

[MR MATHEWS]: Alleged, your Honour, alleged.

BENCH: Just a minute. What's he done? What's he alleged to have done?

[POLICE PROSECUTOR]: His actions have been confrontational. He's actually got in the way of the workers, who've been there lawfully. There has - evidence-----

BENCH: And what, was he arrested, taken into custody?

[POLICE PROSECUTOR]: Yes.

BENCH: Yes. How long was he in custody?

[POLICE PROSECUTOR]: He was only in custody with bail conditions for a short time.

… And the bail conditions were enough so that he could stay away from the premises until 6 p.m. that afternoon, so-----

BENCH: It's all been done, everything's finalised.

[POLICE PROSECUTOR]: Yes.

[MR MATHEWS]: Excuse me, your Honour. Could I make a mention at this stage that the witnesses are in this Court?

BENCH: Well, just sit down, would you?

[MR MATHEWS]: There are witnesses in the Court, sorry, your Honour.

BENCH: Sit down. Will an absolute discharge under section 19 of the Penalties and Sentences Act suffice in this matter? Get rid of it?

[POLICE PROSECUTOR]: Yes, your Honour, if that's acceptable.

[MR MATHEWS]: What is that, please, your Honour?

BENCH: Yes, I've heard the facts. I've heard the facts. I think the appropriate penalty in this case is an absolute discharge under section 19 of the Penalties and Sentences Act. You are discharged.

[MR MATHEWS]: Thank you, your Honour."

[5] Under s 39 *Vagrants, Gaming and Other Offences Act*, a prosecution for an offence under that Act must be heard and determined summarily. It is clear from the quoted transcript that due process did not occur. Mr Mathews plainly indicated to the magistrate that he intended to contest his guilt of the summary charge of public nuisance. But the magistrate did not ask Mr Mathews to plead to the charge. And nor did he hear any evidence; allow Mr Mathews to cross-examine prosecution witnesses; allow Mr Mathews to give or call evidence or address the court on the question of guilt; or determine in a reasoned way whether, on the evidence, Mr Mathews was guilty or not guilty before sentencing him under s 19 *Penalties and Sentences Act* 1992 (Qld).

[6] It hardly need be said that the *Penalties and Sentences Act* 1992 (Qld), as its title and terms make clear, only operates after a person has been found guilty of an offence. The conduct of the proceeding on 1 June 2005 was grossly irregular. It resembled more of the topsy-turvy world of Lewis Carroll's *Alice in Wonderland* ("Sentence first – verdict afterwards") than a court of law in a democracy. Mr Mathews was right to feel aggrieved. Unfortunately, he did not appeal to the District Court from the order of 1 June 2005 within the one month period allowed under s 222(1) *Justices Act* 1886 (Qld). And nor did he apply to the Magistrates Court to have the order set aside.

[7] At some point, the magistrate must have become concerned about the irregularity as the bench charge sheet is endorsed by the magistrate in these terms:

> "1.12.2008 Pursuant to section 188(1)(a) and 5(a) I propose to re-open this sentence and set aside the conviction and relist this matter for trial. Pursuant to 188(3)(a) the parties must be given the opportunity to be heard. I therefore list the application for hearing before me in court 32 at 2.30 pm on Wednesday 17 December 2008. The court is required to notify the parties."

[8] About three and a half year later, on 17 December 2008, the matter was brought on again for hearing before the same magistrate. Mr Mathews' name was called more than twice without a response and court officers checked outside the court but could not find him. The record does not show that Mr Mathews was given notice of this hearing. The following exchange occurred in his absence:

> "BENCH: … Well I'm going to re-open - you – you don't want to be heard on this, do you?
>
> [POLICE PROSECUTOR]: No, just offer no evidence, your Honour.
>
> BENCH: I re-open this matter and set aside the conviction and sentence. Then you said you're offering no evidence; is that right?
>
> [POLICE PROSECUTOR]: That's - that's correct, your Honour.
>
> BENCH: Prosecutor offers no evidence, charge is dismissed, [Mr Mathews] is discharged. Notify [Mr Mathews]. All right. Thank you."

[9] The only sensible inference from the notation on the bench charge sheet and from the transcript is that the magistrate purported to make this order under s 188

Penalties and Sentences Act. There is nothing to suggest the order was purported to be made under s 147A *Justices Act* or under the court's inherent power to correct errors such as a void order. It is, therefore, unnecessary to determine whether s 147A, or any inherent power, could have been invoked to set aside the order of 1 June 2005.

[10] There is no evidence of when Mr Mathews was informed of the order of 17 December 2008. About 15 months later, on 2 March 2010, Mr Mathews applied for an extension of time to appeal from his conviction and sentence on 1 June 2005 to the District Court under s 222 *Justices Act* stating his grounds as:

> "1. I was denied Natural Justice in that I was denied the Right to be Heard. By applying Sec 19 Penalty and Sentences Act, [the magistrate] was finding me guilty, without a plea and without a hearing or his hearing evidence. I had not pleaded guilty. I had paid for and subpoenaed five witnesses together with documents. [The magistrate] bellowed at me to prevent my speaking when I calmly requested explanation.
>
> 2. This was done in this way, by [the magistrate], to PERVERT the course of Justice, and to conceal the Armed Robbery of me by the Police per … and the Brisbane City Council on 29th November, 2004, 30th November, 2004, to and including 1st December, 2004.
>
> 3. This Armed Robbery of me was ARMED ROBBERY of a citizen of Australia, by A BRANCH OF THE GOVERNMENT OF AUSTRALIA, when it was not alleged that I had done anything wrong. This was Armed Robbery of a Citizen by the Australian Government for NO REASON. [The] Magistrate … as another branch of the Australian Government, has greatly exacerbated this criminal wrong of Armed Robbery against a citizen by the Australian Government, by acting in an ***ultra vires*** manner to conceal this criminal wrong against me by the Australian Government. Thus, the actions of [the magistrate] are criminal also."

[11] His application was heard in the District Court on 19 March 2010. The District Court judge considered that because Mr Mathews' finding of guilt was set aside and the nuisance charge dismissed on 17 December 2008, there was no order in the Magistrates Court from which Mr Mathews could appeal and so refused the application for an extension of time. Her Honour noted:

> "While Mr Mathews is concerned about the validity of the process by which he was exonerated, this ruling should serve as a formal confirmation and a public record of the fact that, at this point in time, Mr Mathews does not have a conviction for public nuisance.
>
> …
>
> Mr Mathews is not guilty of the public nuisance offence with which he was charged in 2004."

[12] Mr Mathews then applied for leave to appeal to this Court under s 118(3) *District Court of Queensland Act* from the District Court judge's order. The grounds of his application are:

> "The conviction and operation of the Penalty and Sentences Act on 1 June, 2005, was void ab initio as I was denied a hearing.
>
> On 1 December, 2008, the same magistrate … reopened the sentence and purported to revoke the conviction. This was ultra vires, beyond power of Penalty & Sentences Act Sec 188, which he purported to use."

[13] Mr Mathews has given no explanation for the very significant delay in seeking to appeal. There is, however, no evidence of when he became aware of the order of 17 December 2008. It is clear that the order made by the magistrate on 1 June 2005 must now be set aside if the order of 17 December 2008, which purported to do that, was made without jurisdiction. The gross irregularity and injustice perpetrated on 1 June 2005 in the magistrate's sentencing Mr Mathews before determining, according to law, whether he was guilty of the offence, cannot be permitted to stand. The endorsement on the bench charge sheet of 1 December 2008 suggests that the magistrate recognised this, although many years later. But instead of the parties correcting the matter lawfully, for example, on appeal, the magistrate purported to correct his egregious error by way of s 188 *Penalties and Sentences Act* which relevantly provides:

> "**Court may reopen sentencing proceedings**
>
> 188(1) If a court has in, or in connection with, a criminal proceeding … —
>
> (a) imposed a sentence that is not in accordance with the law; or
>
> …
>
> (c) imposed a sentence decided on a clear factual error of substance;
>
> …
>
> the court, whether or not differently constituted, may reopen the proceeding.
>
> …
>
> (3) If a court reopens a proceeding, it—
>
> (a) must give the parties an opportunity to be heard; and
>
> (b) may resentence the offender—
>
> (i) for a reopening under subsection (1)(a)—to a sentence in accordance with law; or
>
> …
>
> (iii) for a reopening under subsection (1)(c)—to a sentence that takes into account the factual error;

…

(c) may amend any relevant conviction or order to the extent necessary to take into account the sentence imposed under paragraph (b).

…

(5) The court may reopen the proceeding—

(a) on its own initiative at any time; …"

[14] It is clear from the terms of s 188 that it allows a court to re-open and correct a sentence. And it is equally clear that s 188 is not intended and does not allow a court to re-open a proceeding and set aside a finding of guilt other than insofar as this may be related to correcting the sentence. Further, as there is no evidence that Mr Mathews was notified of the hearing of 17 December 2008, it is not shown that he was given the opportunity to be heard.

[15] Mr Mathews is therefore right in his contention that the magistrate's orders of 1 June 2005 and 17 December 2005 should both be set aside on appeal. Unfortunately, Mr Mathews did not appeal from those orders within time and has given no satisfactory explanation for his lengthy delay, although, as I have noted, it is unclear when he became aware of the order of 17 December 2008. But, despite his tardiness in appealing, the interests of justice require that time should be extended and the appeal to this Court allowed so that the manifest errors on the record of the Magistrates Court, which have now been drawn to this Court's attention, can be corrected. In proceeding as he did under the *Penalties and Sentences Act* on 17 December 2008, the magistrate was acting without jurisdiction so that the order made was unlawful and the District Court should have set it aside on appeal. The order of 1 June 2005 sentencing Mr Mathews before determining, according to law, whether he was guilty or not guilty, was also unlawful and the District Court should have set it aside on appeal.

[16] It is for those reasons that I joined in the orders of this Court on 20 July 2010.

[17] **FRASER JA:** I agree with the reasons for judgment of McMurdo P.

[18] **WHITE JA:** I joined in the orders made by this Court on 20 July 2010 set out in the reasons of the President. I did so substantially for the same reasons as her Honour and need add nothing further.